Midwest Canvas Corp. *and* Manufacturing, Production & Service Workers Union, Local #24, Petitioner *and* Production Workers Union of Chicago and Vicinity, Local 707, National Production Workers Union, Intervenor. Case 13–RC–19352

August 14, 1998

DECISION AND ORDER REMANDING FOR A HEARING

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held on October 3, 1997,[1] and the Regional Director's report recommending disposition of it.[2] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 76 for the Petitioner and 36 for the Intervenor with 11 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief and has decided to remand this case for a hearing for the reasons set forth below.

In her report, the Regional Director recommended sustaining Objection 1 on the basis that the late opening of the polls[3] deviated from the election procedure and created doubt and uncertainty which warranted setting aside the election. The Regional Director found that it was impossible to determine whether the election's late start affected the results of the election.

In its exceptions, the Petitioner contends that the late opening of the polls did not warrant setting aside the election because the number of eligible employees who did not vote was insufficient to change the results of the election. The Petitioner claims that it sought to introduce evidence to the Regional Director which showed that the number of eligible voters was less than what was reported on the *Excelsior* list, and that when the ineligible employees are removed from the list, the number of possibly disenfranchised employees is not determinative of the results of the election.[4] The Petitioner argues that, at a minimum, the Regional Director should have ordered a hearing to determine whether any of the 19 employees in question were eligible to vote in the election. For the reasons set forth below, we find merit in the Petitioner's exceptions.

The relevant principles were summarized in *Jobbers Meat Packing Co*., 252 NLRB 41 (1980). The Board "does not set aside an election based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed." Id. However, the Board has set aside elections where one of the following three additional factors was present: (1) "the votes of those possibly excluded could have been determinative";[5] (2) "the record also showed accompanying circumstances that suggested that the vote may have been affected by the Board agent's late opening or early closing of the polls";[6] or (3) "it was impossible to determine whether such irregularity affected the outcome of the election."[7] Id. These principles were reaffirmed in *Celotex Corp*., 266 NLRB 802, 803 (1983), and more recently in *Wolverine Dispatch, Inc.,* 321 NLRB 796 (1996).

The second and third factors are absent here. In other words, the record does not show any "accompanying circumstances" suggesting that the late opening of the polls affected the vote. Nor is it "impossible" to determine if the irregularity affected the outcome of the election. To the contrary, the Petitioner contends that it can be determined if the irregularity affected the outcome of the election, but the Regional Director erroneously refused to consider its evidence.

Accordingly, we now turn to an examination of the first factor, i.e., whether the number of employees possibly disenfranchised is sufficient to affect the election outcome. In order to determine whether the number of possibly disenfranchised employees is sufficient to be determinative, we must know how many eligible voters there were in the unit. Thus, evidence is required concerning the eligibility status of the 19 employees alleged by the Petitioner to be ineligible voters.

If, as alleged by the Petitioner, there were only 141 eligible voters, then there would have been only 18 possibly disenfranchised employees because 123 employees appeared at the polls. This number of possibly disenfranchised employees would be insufficient to affect the results of the election. Thus, even if it is assumed that those 18 votes, as well as the 11 votes of the challenged voters (a total of 29) were for the Intervenor, the Intervenor would still not have sufficient votes to defeat the

[1] All dates are in 1997, unless stated otherwise.

[2] In her report, the Regional Director found it unnecessary to consider the merits of Intervenor's Objections 2-8 in light of her conclusion that the election must be set aside as a result of the conduct alleged objectionable in Objection 1.

[3] The polls did not open until 7:20 a.m., 20 minutes after the polls were scheduled to be open, because the Employer did not provide access to the facility where the election was scheduled to be conducted.

[4] The Petitioner alleges that at least 19 employees were terminated or quit between August 31, when the *Excelsior* list was created, and the day of the election, and that accordingly there were only 141 eligible voters rather than the 160 eligible employees named on the *Excelsior* list. The Petitioner argues that if there were only 141 eligible voters, the number of possibly disenfranchised voters would be insufficient to affect the election results. Accordingly, there would be no need to set aside the election because of the late opening of the polls.

[5] The Board cited, inter alia, *Nyack Hospital*, 238 NLRB 257 (1978) (technical unit and service and maintenance unit).

[6] The Board cited, inter alia, *Nyack Hospital*, supra (office clerical unit).

[7] The Board cited *Kerona Plastics Extrusion Co.*, 196 NLRB 1120 (1972).

Petitioner as the tally shows 76 for the Petitioner and 36 for the Intervenor.

On the other hand, if there were 160 eligible voters, there would have been 37 possibly disenfranchised voters. That number could possibly have affected the election results because if those 37 votes are added to the 11 challenged ballots, those 48 votes, had they been cast for the Intervenor, could have resulted in a victory for the Intervenor.

Our dissenting colleague criticizes our approach as "mathematical" and "mechanical." In fact, our approach follows Board precedent. In *Wolverine Dispatch*, supra, for example, the Board set aside the election because "the approximate number of eligible voters exceeded the number of ballots cast by four," and the four eligible employees possibly disenfranchised by the unscheduled closing of the polls could have been sufficient to affect the election results.[8]

Here, the Petitioner's exceptions cast doubt as to the number of eligible voters in the unit. If the number of eligible voters is as alleged by the Petitioner, then the number of possibly disenfranchised employees would not be determinative of the results of the election and there would be no reason to set aside the election.[9]

Our approach is further supported by *Nyack Hospital*, 238 NLRB 257, 258–260 (1978), a case cited with approval in *Jobbers Meat* and *Wolverine Dispatch*. In *Nyack Hospital*, the Board adopted the Regional Director's recommendation to set aside elections in two bargaining units based on his finding that the number of voters possibly disenfranchised by the late opening of the polls was sufficient to have affected the outcome of the elections. 238 NLRB at 260. In making that finding, the Regional Director subtracted the number of employees who had been terminated or excluded from the unit prior to the election from the number of employees on the eligibility lists. 238 NLRB at 259 fns. 8, 9, and 10. This is precisely the type of calculation that the remand in this case will accomplish.

In two additional cases, also cited in *Wolverine Dispatch*, the Board, consistent with our approach, regarded the approximate number of eligible voters as a significant factor in the analysis. Thus, in *Jim Kraut Chevrolet*, 240 NLRB 460 (1979), the Board reversed the Regional Director and refused to set an election aside, notwithstanding the late opening of the polls, because there was "no evidence that any employee was disenfranchised . . . . Indeed, the official tally of ballots . . . showed that the number of valid votes counted plus the challenged ballot equaled the approximate number of eligible voters."

Similarly, in *Celotex Corp.*, 266 NLRB 802 (1983), the Board found that the late opening of the polls did not warrant setting the election aside. The Board relied, inter alia, on the tally of ballots, which showed that "the number of employees casting ballots, including challenged ballots . . . exceeded the approximate number of eligible voters." 266 NLRB at 803.

We disagree with our dissenting colleague's suggestion that our approach is an unwarranted expenditure of Board resources. To the contrary, we believe that our approach can conserve the Board's resources. The eligibility of the 19 employees in question likely can be easily ascertained, at minimal agency expense. If that determination results in a clear expression of the will of a majority of the eligible unit employees, no second election (probably a more costly proposition) will be necessary. If not, then a second election will be held. We certainly agree with our dissenting colleague that the polls should open at the scheduled time. But, where the late opening could not have disenfranchised enough eligible voters to affect the election results, we see no reason to set aside the election. In our view, adherence to the *Wolverine Dispatch* line of caselaw both protects the integrity of the election process and safeguards the choice of the majority of employees voting in the election.

For these reasons, we remand this case to the Regional Director and direct her to arrange a hearing to receive evidence concerning the eligibility of the 19 employees the Petitioner alleges were terminated or quit. The hearing officer shall issue recommendations concerning the 19 employees' eligibility status and shall determine whether the number of eligible voters possibly excluded from voting as a result of the late opening of the polls proved determinative of the results of the election. If the number of possibly disenfranchised employees is sufficient to affect the results of the election, the election shall be set aside and a new election held.

ORDER

IT IS ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issue raised by Objection 1.

IT IS ORDERED that the designated hearing officer shall prepare and serve on the parties a report containing credibility resolutions, findings of fact, and recommendations to the Board as to the disposition of Objection 1. Any party may, within the time prescribed by the Board's Rules and Regulations, file with the Board in Washington, D.C., eight copies of exceptions to the hearing officer's report. Immediately upon the filing of exceptions, the filing party shall serve a copy on the other parties and file a copy with the Regional Director. If no

[8] 321 NLRB at 796–797. The tally of ballots in *Wolverine Dispatch* showed that of approximately 34 eligible voters, 30 cast ballots, of which 15 were for and 11 were against the Petitioner, and 4 were challenged.

[9] The dissent misstates our position when it claims that our approach "proceeds from the predicate that an *Excelsior* list is both accurate and exclusive, reflecting the precise number of employees eligible to vote in an election." Obviously, if that statement were true, we would not be remanding this proceeding for a hearing to determine if, as claimed by the Petitioner, 19 employees included on the *Excelsior* list were terminated or quit before the election and thus were not eligible voters.

exceptions are filed, the Board will adopt the recommendations of the hearing officer.

IT IS ORDERED that this proceeding is remanded to the Regional Director for Region 13 to issue notice of the hearing.

MEMBER BRAME, dissenting.

I do not join my colleagues' decision to remand this proceeding for a hearing. Rather, I would adopt the Regional Director's recommendations, as set forth in her attached report, to sustain the Intervenor's Objection 1 and to set aside the election based on the opening of the polls 20 minutes late and the possible disenfranchisement of voters.

Briefly, the parties' Stipulated Election Agreement called for the election to be held from 7 to 8 a.m. and from 3 to 5:30 p.m. However, the polls in the morning session did not open until 7:20 a.m. The tally of ballots showed that, of approximately 160 eligible voters, 76 cast ballots for the Petitioner and 36 for the Intervenor, with 11 challenged and 2 void ballots.

In support of their decision to remand this proceeding for a hearing, my colleagues assertedly rely on principles established by a long line of precedent, as summarized in *Jobbers Meat Packing Co.,* 252 NLRB 41 (1980), and as more recently reaffirmed in *Wolverine Dispatch, Inc*., 321 NLRB 796, 797 (1996). My colleagues, however, have misapplied this precedent. Thus, I note that the Board in *Wolverine Dispatch* stated: "[W]hen election polls are not open at their scheduled times, the proper standard is whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether that number of voters, or any voters at all, were *actually* disenfranchised." (Emphasis in the original, footnote omitted.) Purporting to apply *Wolverine Dispatch,* the majority remands this proceeding for a hearing to determine the precise number of eligible employees in the unit in light of the Petitioner's assertions that 19 of the employees included on the *Excelsior* list in fact were ineligible to vote because they either quit or were terminated before the election and that, therefore, the number of eligible voters who may have been disenfranchised could not have affected the results of the election.

I find that *Wolverine Dispatch* and the precedent it cites do not contemplate a hearing of the kind directed in the present case. In *Wolverine Dispatch,* the Board set aside an election where, as here, the number of apparently eligible employees possibly disenfranchised due to the late opening of the polls, when combined with the number of challenged ballots in the election, could be sufficient to affect the election results. Thus, the Board did not, as the majority's reading of that case would seemingly require, remand the proceeding for a determination whether, after resolution of the challenged ballots, there remained a sufficient number of possibly disenfranchised employees to affect the outcome. Furthermore, the case law cited in *Wolverine Dispatch* is expressly based on the realistic assessments that the extent to which a substantial departure from scheduled election hours may affect an election is frequently impossible to determine, that such a deviation may affect the ensuing votes in the election, and that, where doubts are cast on the election results, the Board has no alternative but to direct a second election to ensure the integrity of the election process itself. See *Nyack Hospital*, 238 NLRB 257, 258–260 (1978), and cases discussed therein. In short, the Board has previously rejected the mathematical and mechanical approach taken by the majority here.[1]

I find wholly unpersuasive my colleagues' reliance on *Nyack* as support for their approach. Although, as they point out, the Regional Director in *Nyack* subtracted the number of employees who had been terminated or excluded from the number of the employees on the eligibility lists for each of the three units involved, he relied on the apparent agreement of the parties at the pre-election conference. Nor are *Jim Kraut Chevrolet*, 240 NLRB 460 (1979), and *Celotex Corp.*, 266 NLRB 802 (1983), on which the majority also relies, any more availing to their argument. Thus, in *Jim Kraut* the Board specifically found that there was no evidence that any employee had been disenfranchised, and in *Celotex* the Board expressly noted that the objections did not allege any possible disenfranchisement of employees. And, significantly, none of these cases involved, as does the present case, assertions by one party in the nature of postelection challenges to employees whose names appeared on the eligibility list and the Board's remanding for litigation to resolve the issue.

My colleagues cite these cases as support for the "type of calculation that the remand in this case will accomplish." But, as indicated, the situations in those cases are clearly distinguishable from that in the present case and, in my view, the holding of a hearing here cannot reasonably be characterized as merely involving a "calculation." Furthermore, in relying on *Jobbers*, *Nyack* and *Celotex*, my colleagues effectively read out of these cases the language from Board precedent stating that it is frequently impossible to determine the impact on employees of a substantial departure from the scheduled opening

[1] The majority's approach necessarily proceeds from the predicate that an *Excelsior* list is both accurate and exclusive, reflecting the precise number of employees eligible to vote in an election. An *Excelsior* list, however, is prepared solely by the employer and primarily for the purpose of enabling the parties to communicate with unit employees. It does not constitute an agreement by the parties as to the eligibility of the listed employees to vote, nor is it given conclusive effect by the Board on questions of eligibility. See *O.E. Szekeley & Associates,* 117 NLRB 42, 44–45 (1957). Moreover, our reported cases illustrate that omissions of names from *Excelsior* lists are common. See, e.g., *Meadow Valley Contractors,* 314 NLRB 217 fn. 1 (1994); *Ponce Television Corp. (WRIK-TV-Channel 17)*, 192 NLRB 115 (1971); *Gamble Robinson Co.,* 180 NLRB 532 (1970).

of the polls and holding that, where doubts have been cast on the election results, the election should be set aside even where the votes of possibly disenfranchised employees could not have been determinative. See *Jobbers*, supra at 41,[2] *Nyack*, supra at 259, and *Celotex*, supra at 803. Finally, my colleagues' reliance on N*yack* is particularly puzzling given the fact that the Board there applied the above-stated principles and set aside the election in the office clerical unit, notwithstanding its specific finding that the number of possibly disenfranchised employees was not determinative of the election outcome. Thus, *Nyack* is directly contrary to the approach my colleagues espouse.

In sum, the present case involves a substantial departure from the scheduled opening of the polls, the possible disenfranchisement of a substantial number of employees, and substantial doubts as to the integrity of and employee confidence in the Board's election process. Accordingly, I conclude that the holding of a hearing is wholly unwarranted and a totally unnecessary expenditure of the Board's limited resources.[3] Therefore, and in agreement with the Regional Director, I would sustain the Intervenor's Objection 1, set aside the election and direct a second election.

[2] My colleagues acknowledge the language from *Jobbers* that the Board has set aside elections where it was impossible to determine whether the deviation from the scheduled election times affected the outcome. They conclude, however, that this is not such a case because the number of employees actually disenfranchised may, after a hearing, no longer be determinative of the results. My colleagues' reasoning escapes me. Thus, *Jobbers*, in summarizing the situations in which elections have been set aside, refers separately to cases in which the number of possibly disenfranchised employees could have been determinative. It then, *in addition*, refers to other situations where, *although the number of possibly disenfranchised employees could not have been determinative,* the Board has set aside elections, including as one category, cases where it is impossible to determine whether the deviation from the scheduled election times affected the outcome. *Jobbers*, supra at 41. (Emphasis provided.) Thus, it is plain from the language of *Jobbers* itself that the latter category of cases applies whether the number of possibly disenfranchised employees is determinative. My colleagues, by construing the language of *Jobbers* as they do, have simply read out the very language on which the Board has effectively relied to set aside elections where there are substantial doubts as to their fairness.

[3] I am not as confident as my colleagues that the eligibility of the 19 employees whom the Petitioner asserts were no longer employed as of the date of the election can be decided at "minimum agency expense." At the hearing the Employer, the Intervenor, or both may contest the Petitioner's assertions concerning the status of the 19. Moreover, following the hearing and the issuance of a report, it may be that the number of possibly disenfranchised employees will remain determinative of the election results and that a second election must nevertheless be directed. As a practical matter, the immediate direction of a second election eliminates both the delay and the expense of a hearing, and, more importantly, it ensures the integrity of the Board's election processes.

APPENDIX

THE OBJECTIONS

Objection 1

The polling place for the election was opened late by over 20 minutes.

From the investigation, the evidence is clear that the polls did not open until 7:20 a.m., 20 minutes after the polls were scheduled to open. It is also clear the reason the polls were opened late was because the Employer did not provide access to the facility where the election was scheduled to be conducted by the Board agent. The Employer claimed that he had no keys to the facility where the election was being conducted. This irregularity concerns an essential condition of an election which is that all eligible employees must be given an opportunity to vote. *Whatcom Security Agency*, *Inc.,* 258 NLRB 985 (1981).

The Petitioner contends that the late opening of the polls does not warrant overturning the election because the number of eligible employees who did not vote is insufficient to change the outcome of the election. However, even if the votes of the excluded employees would not have affected the results of the election, the Board has set aside elections where it was impossible to determine whether such an irregularity affected the outcome of the election. *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980). Further, the Board has set aside elections regardless of whether the ballots of employees possibly excluded from voting proved determinative, because the votes cast after the polls were opened late may have been affected by the late opening. *The Nyack Hospital*, 238 NLRB 257 (1978) and *B & B Better Baked Foods, Inc.*, 208 NLRB 493 (1974). In this instance, it is impossible to determine whether the lateness of the opening of the polls affected the results of the election. This deviation from the election procedures creates doubt and uncertainty as to the results of the election and warrants setting aside the election and holding a new one. *Whatcom*, at 985.

Under these circumstances, I am setting aside the election based on the evidence contained in Objection 1, and, accordingly, I find it unnecessary to consider the merits of the other objections filed by the Intervenor.

CONCLUSION

On the basis of the foregoing, it is the conclusion and the recommendation of the undersigned that the election conducted on October 3, 1997, should be set aside and that a new election be conducted.[1]

[1] Under the provision of Sec. 102.69 of the Board's Rules and Regulations, as amended exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington on November 7, 1997.

Under the provisions of Sec. 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition thereto that the party filed with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.